No. 14,744

United States Court of Appeals

For the Ninth Circuit

DONALD M. WOLLAM, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	

Appeal from the United States District Court for the District of Oregon.

APPELLANT'S REPLY BRIEF.

GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
NORMAN LEONARD,
240 Montgomery Street, Fifth Floor,
San Francisco 4, California,
Attorneys for Appellant.

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APPELLANT'S REPLY BRIEF.

In this brief we will not reargue the case in full but will seek only to answer such portions of the government's brief as we believe require answer. For the rest, we will rely upon what we said in our opening brief.

I.

THE SETTING IN WHICH THE QUESTIONS WERE ASKED CLEARLY SHOWS THAT THEY WERE INCRIMINATING.

A. This Court has a right and a duty to consider the complete record of the Subcommittee in order to evaluate the setting.

The government's chief complaint seems to be that appellant has referred this Court to the entire record

before the Subcommittee, and that he has not, as the government would wish, limited his presentation here to only a portion of that record.

Appellant submits that while the complete record of the Subcommittee's proceedings might well have been introduced below, there is no reason why this Court should deny itself any information which will enable it to determine this appeal upon the basis of justice and equity. This Court clearly may take judicial notice of the proceedings of a Congressional Committee (*United States v. Darby,* 312 U.S. 100, 109; *Overfield v. Pennroad Corp.,* 146 F.2d 889, 898 [3 Cir.]), and it is particularly appropriate that it do so in a case involving an alleged contempt of a Congressional Subcommittee. The government wishes the Court to examine part of the Committee's records to see if a contempt was committed; the appellant submits that an examination of the entire record shows that one was not.

Further, in cases involving a claim of the privilege against self-incrimination, the Courts have not taken any narrow or restricted view of what they might or might not consider in assessing the validity of the claim. As Mr. Chief Justice Taft remarked many years ago, a judge in such a case "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence" (*Ex parte Irvine,* 74 F. 954, 960 [C.C. Ohio]). This language is quoted with approval in *Hoffman v. United States,* 341 U.S. 479, 487, where it was specifically held that a "supplemental record" filed after the trial was

over, "should have been considered by the Court of Appeals" because

> "The ends of justice require a discharge of one having such a right *whenever* facts appear to sustain the claim of the privilege" (346 U.S. at 489; italics added).

In *Maffie v. United States,* 209 F. 2d 225 (1 Cir.), relied upon by the government, what was sought to be introduced for the first time on appeal were a series of newspaper articles; here we ask the Court to consider only the official printed records of the Congressional Committee.[1] To ask this Court to ignore the record before the Subcommittee—to ask it to disregard the entire setting in which the questions were asked—is to ask it to be a "blind" Court which does not see that which "all others can see and understand." Cf. *United States v. Rumely,* 345 U.S. 41, 44. Two decades of experience with committees such as the one here involved have taught the Courts, as well as the public, that the purpose of their investigations and the validity of the claims of those who refuse to testify before them, can be ascertained only by a full examination of their records.

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[1]Furthermore, the *Maffie* observations are obviously dicta since the conviction of contempt there was *reversed* (even without regard to the supplemental material) on the ground that although the questions were apparently innocuous, nonetheless the "background" of the investigation (209 F.2d at 230) was enough to show that somehow appellant was "implicated" in the criminal transaction (209 F.2d at 232). Here, of course, the same situation is clearly presented; see *infra,* subpoints B, C, and D. So, too, is the *Rumely* observation (Brief for Appellee, p. 10) *dicta,* since there also the conviction of contempt was *reversed* in the Court of Appeals and this ruling was affirmed in the Supreme Court (*Rumely v. United States,* 197 F.2d 166 [D.C. Cir.], affirmed 345 U.S. 41).

The approach by the government in this case represents a new attack on the constitutional privilege. Heretofore, prosecutors hostile to the high purposes which the Fifth Amendment was intended to protect, have sought to whittle down its scope by urging upon the Courts narrow constructions and restrictive interpretations. Now that the law is settled that they were wrong all along in so doing (*Blau v. United States,* 340 U.S. 159; *Hoffman v. United States,* 341 U.S. 479; *Quinn v. United States,* 349 U.S. 155; *Emspak v. United States,* 349 U.S. 190; *Trock v. United States,* 351 U.S. 976), they seek to emasculate the amendment in other ways: by claiming waiver (cf. *Rogers v. United States,* 340 U.S. 367), or by suggesting that the claim was "premature" (cf. *United States v. Trock*, 232 F. 2d 839 [2 Cir.], reversed 351 U.S. 976), or, as here, by arguing that there was no "showing" to support what is otherwise apparently conceded to have been a valid claim of the privilege.[2] Forced as it is by the recent decisions of our highest tribunal to recognize that appellant was exercising a "precious constitutional privilege" (Brief for Appellee, p. 27), the government seeks to satisfy its high obligation in the premises by paying lip service to the privilege, whilst at the same time seeking by the most technical of objections to destroy it.

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[2]See Brief for Appellee, p. 19, where it is conceded that the question as to employment "would have been potentially vulnerable". The same concession is made by the government respecting the question "concerning residence" in the companion case of MacKenzie (Brief for Appellee in No. 14,745, p. 10).

There is no justification whatsoever for the government's attempt to keep this Court in ignorance of the complete story of what went on in Portland at the time appellant was called as a witness before the Committee.

B. Even without such consideration, the "record" reveals a reasonable basis for the fear of self-incrimination.

In any case, the "record", even as the government narrowly construes it, contains more than enough to show that appellant properly invoked the privilege.

It appears from that very "record" that before appellant was called as a witness, the Subcommittee chairman made "an opening statement" in which he said that the purpose of the hearings was "to investigate communist and subversive activities in this area" (R. 49). It further appears from that "record" that it was in direct connection with that investigation that appellant was subpoenaed.[3] Thus, it appears that the Committee had reason to believe that appellant could given "information concerning communist activities in this area" (R. 50). Indeed, according to Subcommittee counsel, who was the only witness for the prosecution in this case, the Committee had "definite confidential information . . . that Mr. Wollam had associated with suspected communists . . ." (R. 51). With "that preliminary", to use the apt words which the prosecutor himself employed upon the trial (R. 51), appellant was called before the Subcommittee.

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[3]Indeed, if this were not so, it is hard to see how any testimony appellant could have given would have been pertinent.

But that is not all. The "record" reveals that on June 17, 18 and 19, 1954 (appellant testified before the Subcommittee on June 19), there was substantial publicity in the Portland press concerning the purposes for which the hearings were being held (R. 84-87; Exhibits 18, 19 and 20). The "record" shows that before appellant was called, the press carried stories to the effect that the Committee was going to investigate "communist domination of labor unions" (R. 84); and that local officers "well known for . . . ferreting out subversion" were to be in attendance (R. 85).[4]

Certainly, no more was shown in *United States v. Trock,* 232 F. 2d 839 (2 Cir.), reversed 351 U.S. 976. There Trock had been called before a grand jury investigating thefts of goods in interstate commerce. He had been asked a series of questions relating to his address, his business, other names he may have used, etc. He refused to answer and, while asserting

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[4]As we have already pointed out (Appellant's Opening Brief, note 20) this testimony was improperly excluded. *Alexander v. United States,* 181 F.2d 480 (9 Cir.); *Doran v. United States,* 181 F.2d 489 (9 Cir.); *Kasinowitz v. United States,* 181 F.2d 632 (9 Cir.); *Healey v. United States,* 186 F.2d 164 (9 Cir.); cf. *Emspak v. United States,* 349 U.S. 190, 200. The failure of appellant, appearing *pro se,* to assign this exclusion as error may not defeat his appeal as the government suggests (Brief for Appellee, p. 3), since an exception was allowed below (R 87) and in any case, in view of the foregoing decisions of this Court, which had been cited below (R 82), the ruling was plain error. F. R. Crim. Pro. 52(b).

As we also pointed out (Appellant's Opening Brief, p. 23), the attendance of law enforcement officers is an important factor in determining whether the claim of the privilege is validly asserted. *Hoffman v. United States,* 341 U.S. 479, 489; *Jackins v. United States,* 231 F.2d 405, 409 (9 Cir.); *Aiuppa v. United States,* 201 F.2d 287, 299 (6 Cir.).

a belief that his answers might incriminate him, he made no "showing" of how they might do so (see 232 F. 2d at 841).

As the "record" at bar contains the statement of the Committee chairman and counsel that Wollam was believed to have "associated with suspected communists" (*supra*), so in *Trock* the Assistant District Attorney had said that the government had reason to believe the defendant there "may have some knowledge" of the matters which the government was seeking to uncover (see 232 F. 2d at 840).

Taking the view that the questions were innocuous on their face and that the defendant was required to "show" how the answers would incriminate him, the Court of Appeals, over the dissent of Judge Medina, and with the dubious concurrence of Chief Judge Clark, affirmed the conviction. As we noted in our opening brief, the Supreme Court entered a *per curiam* reversal basing itself solely on *Hoffman v. United States,* 341 U.S. 479 (*Trock v. United States,* 351 U.S. 976). We have already pointed out that *Hoffman* held that the Court of Appeals, in assessing the validity of the anti-self-incrimination claim, should have considered the supplemental record because "justice" requires that the claim be sustained *whenever* facts appear which justify this result.

In *United States v. Courtney,* 236 F. 2d 921 (2 Cir.), decided after *Trock,* the Court sustained the claim of the privilege *on grounds urged for the first time on the appeal,* despite the complaint of the

dissenting judge that "[i]t took legal research after the event to discover" the provisions of law under which the appellant "conceivably could be prosecuted" (231 F. 2d at 925). Here we do not go so far. The grounds urged here are the same as those urged below and the "record" here, either with or without a consideration of the full proceedings before the Subcommittee, establishes the validity of the grounds so urged.

C. Appellant is not required to incriminate himself before he can obtain the advantages of the privilege against self-incrimination.

While the government here cites *Hoffman v. United States,* 341 U.S. 479, for the proposition that the "say-so" of the witness does not of itself establish the danger of incrimination (Brief for Appellee, p. 20), it neglects to note that the Court was careful immediately thereafter to qualify any such broad, sweeping observation. It said:

> "However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."
>
> *Hoffman v. United States,* 341 U.S. 479 at 486-487.

It is perfectly obvious here that once the "record" established the purpose of the inquiry and the belief on the part of the investigators that appellant had connections or associations with communists or communism, appellant was justified in claiming the privilege against self-incrimination and was not required to make any further showing. He was not required to surrender the protection which the privilege was intended to secure, in order to secure the benefits of the privilege. As Judge Medina said in the *Trock* case:

> "The protection of the Fifth Amendment would be a mere mockery if the witness could avail himself of the privilege only by demonstrating his guilt."
>
> *United States v. Trock,* 232 F. 2d 839 at 845.[5]

The fact that appellant has gone further than he needed and has directed attention to a public record which buttresses his claim of the privilege, in no wise derogates from the fact that enough was shown below, even without this, to sustain his claim, without requiring him to demonstrate his guilt.

D. The incriminating character of the questions asked is manifest.

Since the interrogation of appellant was premised upon the Committee's belief that he had "associated with suspected communists" (R. 51), and since evi-

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[5]Even the dissenting judge in *United States v. Courtney,* 236 F.2d 921 (2 Cir.) recognized that "[w]hen the privilege is claimed, the judge seldom if ever has very much evidence before him to support the claim, for ordinarily only the witness knows enough of the facts and of course he should not be compelled to reveal them" (236 F.2d at 925).

dence had already been received concerning the unlawful purposes of communism, the concealment and deceit in the communist "underground"[6] including changes of names, identities and ages, the use of homes as secret meeting places for communists, etc. (Appellant's Opening Brief, pp. 2-7, 21-23), it is clear that the fear of self-incrimination was not an unreasonable one.

In addition to the authorities already cited in our opening brief (pp. 21-22, 27-29), we call attention to two cases recently decided by the Court of Appeals in New York: *United States v. Gordon,* 236 F. 2d 916 (2 Cir.), and *United States v. Courtney,* 236 F. 2d 921 (2 Cir.). In those cases it was hard to see the self-incriminatory character of answers to apparently innocuous questions and the prosecutor argued there, as he does here, that to sustain the privilege in such circumstances would be seriously to impair the government's investigative efforts. The answers to this argument was given by Judge Frank in the *Gordon* case:

> "That argument cuts too far: It would yield the patently illegal repeal by judges of the constitutional provision guaranteeing the anti-self-incrimination privilege. That provision unquestionably does sometimes impede enforcement of the criminal laws. But that was one of the clear purposes of the constitutional privilege, i.e., to

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[6]Cf. *Kremen v. United States,* 231 F.2d 155 (9 Cir.), pending on certiorari in the United States Supreme Court, October Term 1956, No. 162.

> prevent a court from compelling a witness—who might or not be a criminal—to give testimony which might incriminate him. All privileges not to testify have the same impeding effect . . .
>
> "American prosecutors must learn to adjust themselves to these obstacles. The purpose of the Bill of Rights was, as Madison declared 'to oblige the government to control itself.' We are committed to the principle that any method of pursuing suspected criminals must give way when it clashes with these constitutional guarantees . . . Considered solely in terms of procedure, those constitutional safeguards seem logically indefensible. Considered, however, as conferring substantive rights, they assume a different significance: They express the high value our democracy puts on the individual's right of privacy." (236 F. 2d at 919-920.)

Nor can the suggestion that appellant had ulterior reasons for refusing to testify (Brief for Appellee, p. 15) change the result.

> "If he was clearly entitled to assert the privilege, his motives for doing so are immaterial. See Taft, J., in Ex parte Irvine, C.C., 74 F. 954, 964-965; cf. United States v. St. Pierre, 2 Cir., 128 F.2d 979, 980."
>
> *United States v. Courtney*, 236 F. 2d 921, 923 [2 Cir.].

Only by totally disregarding the Supreme Court's admonition not to interpret this constitutional protection in a "hostile or niggardly spirit" (cf. *Ullman v. United States,* 350 U.S. 422, 426), can one say that appellant's claim was not a valid one.

II.

THE INDICTMENT WAS DEFECTIVE FOR FAILURE TO ALLEGE THAT APPELLANT'S REFUSAL WAS UNLAWFUL, WILFUL, DELIBERATE, OR INTENTIONAL, OR WITHOUT JUST, PROPER, OR LEGAL CAUSE OR PROVOCATION.

The point has been fully covered in our opening brief (p. 17) and need not be here reargued. It should be noted, however, that the chief reliance of the government in opposition, *United States v. Deutch,* 235 F. 2d 853 (D.C. Cir.) (Brief for Appellee, pp. 14-15), is misplaced. The prosecutor clearly misreads the *Deutch* opinion and ignores its obvious inapplicability to the case at bar. For in that case, unlike this one, the indictment alleged that the refusal to answer was "unlawful", and the Court made it clear that this fact was decisive.

> "Any doubt . . . is resolved by the presence of the word 'unlawfully' preceding 'refused' in this indictment. That would satisfy the statute since a refusal would be unlawful only if it were wilful. In other words, if 'refused', standing alone, were held not sufficient because it does not connote a refusal which violates the statute, the presence of the word 'unlawful' would remedy that defect." (235 F. 2d at 854.)

Here the defect in the indictment is not remedied by the presence of the word "unlawful" or any similar word, and the *Deutch* case therefore is not applicable. This indictment, unlike that one, is therefore patently defective.

The prosecutor's reference to other cases in which the indictment contained neither the word "wilful"

nor "unlawful" is not well taken because there is not a single one of them in which the conviction was affirmed. In every one of them the conviction was reversed; the Courts therefore had no occasion to pass upon the point at issue. The prosecutor has not cited a single case in which an Appellate Court has said that an indictment which does not allege that the refusal to answer was unlawful, wilful, intentional, deliberate or without just, proper or legal cause, is a valid indictment. There is not cited a single case in which an Appellate Court affirmed a conviction upon an indictment alleging merely a refusal to answer.

This same point is presented by the briefs and arguments in *Simpson v. United States,* No. 14,743 in this Court, submitted for decision on November 16, 1956, and reference to that case is made for a further elaboration of appellant's position here.

III.

REMAINING QUESTIONS.

The balance of the argument—failure to plead facts showing pertinency, failure of proof of pertinency and wilfulness, and failure to direct an answer—is fully developed in our opening brief. We are of the view that nothing said in the government's brief has adequately met the argument we there made.

The heavy reliance upon cases decided long before *Quinn v. United States,* 349 U.S. 155; *Emspak v.*

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The heavy reliance upon cases decided long before *Quinn v. United States,* 349 U.S. 155; *Emspak v.*

United States, 349 U.S. 190, and *Trock v. United States,* 351 U.S. 976,[7] indicates that the government is still pressing for an approach to the Fifth Amendment privilege against self-incrimination which has been long since rejected by the Supreme Court and by this Court as well.[8] If this Court is to continue to reflect the position taken in the last few years and months by the Supreme Court, on the issues here presented, it can do no other than reverse this conviction.

Dated, San Francisco, California,
December 5, 1956.

Respectfully submitted,
GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
By NORMAN LEONARD,
Attorneys for Appellant.

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[7]E.g., *United States v. Josephson,* 165 F.2d 82 (2 Cir.); *Barsky v. United States,* 167 F.2d 241 (D.C. Cir.); *Eisler v. United States,* 170 F.2d 273 (D.C. Cir.); *Lawson v. United States,* 176 F.2d 49 (D.C. Cir.).

[8]See this Court's recent decisions in *Jackins v. United States,* 231 F.2d 405 (9 Cir.); *Starkovich v. United States,* 231 F.2d 411 (9 Cir.); and *Fagerhaugh v. United States,* 232 F.2d 803 (9 Cir.).